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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 883

BAKER NATIONAL BANK, Appellant,

v.

FRANCES S. HENDERSON, Administratrix of the Estate of Elmer S. Henderson, Deceased,

Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA.

STATEMENT AS TO JURISDICTION

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

No._____

BAKER NATIONAL BANK, Appellant,

v.

FRANCES S. HENDERSON, Administratrix of the Estate of Elmer S. Henderson, Deceased,

Appellee

Appeal from the Supreme Court of the State of Montana.

Statement as to Jurisdiction

The Appellant, pursuant to United States Supreme Court Rules 13 (2) and 15, file this their statement of the basis upon which it is contended that the Supreme

Court of the United States has jurisdiction on a direct appeal to review the final decision of the Supreme Court of the State of Montana, and should exercise such jurisdiction in this case.

OPINION BELOW

Upon the granting of Defendant's Motion for Summary Judgment, the Trial Court issued a one-page Memorandum Opinion. This opinion is not reported in any official or un-official reports. A copy of this Opinion and a copy of the Order granting Motion for Summary Judgment is appended hereto. In affirming the trial Court's action, the Montana Supreme Court issued a written opinion which is reported

in 445 P.2d 574 (1968). A copy of this opinion is appended hereto.

JURISDICTION

The appeal herein is from the final decision of the Montana Supreme Court affirming a trial Court's Order Granting Motion for Summary Judgment and holding that such Sections 91-2701 and 91-2704 of the Revised Codes of Montana, 1947, do not deny persons of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

The trial Court's Order Granting Motion for Summary Judgment was made and entered on November 24, 1967. The decis-

ion of the Supreme Court of the State of Montana was rendered and filed on October 2, 1968. Notice of Appeal to the Supreme Court of the United States was filed in the District Court of the Sixteenth Judicial District of the State of Montana, in and for the County of Fallon - the Trial Court below which possessed the record at that time - on November 29, 1968.

The Supreme Court of the United States has jurisdiction to review by direct appeal the decision of the Supreme Court of the State of Montana by the provisions of 28 U.S.C. § 1257 (2).

The following decisions are believed to sustain the jurisdiction of the Supreme

Court to review the judgment and decision of the Montana Supreme Court on appeal in this case:

Standard Oil Co. of Calif. v. Johnson, 316 U.S. 481 (1942), Winters v. New York, 33 U.S. 507 (1948), Miller v. Schoene, 276 U. S. 272 (1928).

The two statutes that are involved in this case are as follows:

Section 91-2701 of the Revised Codes of Montana, 1947: *

*Although the Montana Supreme Court referred to Section 91-2702 of the Revised Codes of Montana, the Appellant cited the above section at each step in the proceedings of the case and in all written briefs prepared for either the Trial Court or the Supreme Court. It is suggested that the reference by the Montana Supreme Court to a different section constituted a clerical error.

§ 91-2701

"Every executor or administrator must, immediately after his appointment, cause to be published in some newspaper in the county, if there be one, if not, then in such newspaper as may be designated by the court or judge, a notice to the creditors of the decedent, requiring all persons having claims against him to exhibit them, with the necessary vouchers, to the executor or administrator, at the place of his residence or business, to be specified in the notice; such notice must be published as often as the court or judge shall direct, but not less than once a week for four weeks; the court or judge may also direct additional notice by publication or posting. In case such executor or administrator resigns, or is removed, before the time expressed in the notice, his successor must give notice only for the unexpired time allowed for such presentation; provided, that in estates where the value of the property is less than the preferred claims against said estate, or in estates wherein the property thereof has been or is set apart to the surviving widow and/or children as provided by law, in which cases no notice to creditors need be given."

Section 91-2704 of the Revised Codes of Montana, 1947:

§ 91-2704

"All claims arising upon contracts, whether the same be due, not due, or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever; provided, however, that when it is made to appear by the affidavit of the claimant, to the satisfaction of the court or judge, that the claimant had no notice as provided in this chapter, by reason of being out of the state, it may be presented at any time before an order of distribution is entered; and, provided, further, that nothing in this chapter contained shall be so construed as to prohibit the right, or limit the time, of foreclosure of mortgages upon real property of decedents, whether heretofore or hereafter executed, but every such mortgage may be foreclosed within the time and in the manner prescribed by the provisions of this code, other than those of this chapter, except that no balance of the debt secured by such mortgage remaining unpaid after foreclosure shall be a claim against the estate unless such debt was presented as required by the provisions of this chapter."

QUESTIONS PRESENTED

Section 91-2701 of the Revised Codes of Montana, 1947, provides for the giving of notice to creditors of an estate by publication in a local newspaper once a week for four successive weeks. The Montana statutes provide for no other method of giving notice to creditors. Section 91-2704 of the Revised Codes of Montana, 1947, provides that all claims must be presented within the time provided for in the aforementioned notice and any claim not so presented is barred forever. The principal questions presented are:

1) Whether the above provisions

constitute an unconstitutional denial of property without due process of law because a claimant may have his claim barred without receiving actual notice of the time and place for filing such a claim even though such notice could have been made with ease and little effort.

2) Whether the above provisions are unconstitutional because they deny a Montana resident equal protection under the law in that a resident of some other state, unlike a Montana resident, may have his claim awarded even though not timely when he shows by affidavit that he did not receive actual notice.

STATEMENT OF THE CASE

Prior to his death, Elmer S. Henderson borrowed Six Thousand Dollars ($6,000.00) from the Appellant on an unsecured promissory note. He died on September 25, 1966, before the note became due and before any payments were made on the note. The Appellee was appointed and qualified as administratrix and caused notice to creditors to be published pursuant to Section 91-2701 of the Revised Codes of Montana, 1947, commencing October 20, 1966. The time provided for by statute for the filing of creditors' claims expired on February 20, 1967. The Appellant filed its creditor's

claim on March 20, 1967. Notice of the rejection of the creditor's claim was filed April 10, 1967.

On July 28, 1967, the Appellant filed a verified petition or affidavit stating that the Appellant had received no actual notice of the time for presentation of creditors' claims even though the claim was known to Appellee and actual notice could have easily been given. No action was taken on this petition.

On June 1, 1967, the Appellant filed an action in the District Court against the Appellee for the full amount of the claim. The Appellee filed a motion for Summary Judgment and before this motion

was argued the Appellant filed a Request for Admissions. Then, on November 27, 1967, without waiting for the answers to this Request for Admissions, the trial judge granted the Appellee's Motion for Summary Judgment. The Request for Admissions is appended hereto as Appendix No. 4.

The following facts were set forth in the Request for Admissions: The indebtedness was valid except for the untimely filing of the creditor's claim; the indebtedness was known to the administratrix and to the attorney for the administratrix at all times; the address and location of the Appellant was known at all times by both persons; the office

of the Appellant bank is located within two short blocks of the office of the attorney which was designated as the place for the transaction of all business of the estate; no attempt was made by the administratrix, her attorney, or any other person representing the estate, to give notice to the Appellant or any of the Appellant's officers, either in person or by mail, of the time and place for filing creditors claims in the estate; the administratrix or her attorney could have caused such notice to be sent to the Appellant by mail or to be delivered to its business office or to one of its officers with little or no effort; neither

the Appellant nor any of its officers had actual knowledge of the time for filing the creditors claims or of the publication of the notice to creditors until just prior to the filing of its claim.

The trial judge, in his Memorandum Opinion, stated that he was bound by the statutes. See Appendix No. 2. The Montana Supreme Court stated ~~in their~~ opinion filed on October 2, 1968, that any change in the law must come from the legislature and that "the Mullane doctrine is not applicable to probate proceedings."

The principle issue presented to the trial court and to the Montana Supreme Court was the constitutional issue as to

whether or not the Montana non-claim statutes violate the due process clause of the Fourteenth Amendment. The question of whether or not the same statutes violate the equal protection clause of the Fourteenth Amendment was raised for the first time in oral argument before the Supreme Court of the State of Montana. Although it was duly noted by the members of the Court at that time, this point was not discussed in the Court's opinion. Both of these issues are crucial to the determination and final disposition of this case unless one be first decided in favor of the Appellant.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

A. Montana's Non-Claim Statute denied to the Appellant his property without due process of law in violation of the Fourteenth Amendment.

It is well established that, "the fundamental requisite of due process of law is the opportunity to be heard." Grannis v. Ordean, 224 U.S. 385, 394 (1914). Furthermore, this right to be heard has little value "unless one is informed that the matter is pending and can chose for himself whether to appear or default, acquiese or contest." Mullane v. Central Hanover B. & T. Co., 339 U.S. 306, 314 (1950).

The method of notice required by the due process clause and the question of sub-

stituted service, such as service by publication in a newspaper, were carefully and fully treated by This Honorable Court in Mullane v. Central Hanover B. & T. Co., supra. In that case it was stated that the due process clause of the Fourteenth Amendment requires notice which is "reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action." 339 U.S. at 314. The Court further stated that the means employed to give notice must be similar to the method a person would adopt to inform another person he wished to actually inform. Notice by publication to known persons is inadequate because

it is not reasonably calculated to reach those persons who could easily be informed by other means. 339 U. S. at 314 et seq.

Referring specifically to publication in a newspaper, the Mullane opinion makes it quite clear that This Honorable Court regards such a method as unreliable. The opinion states:

> Chance alone brings to the attention of even a local resident an advertisement in a small type inserted in the back pages of a newspaper . . . . 339 U. S. at 315.

In recent years the Mullane doctrine has been applied broadly. For example, in addition to the settling

of accounts of a trustee, the Mullane doctrine has been applied to condemnation proceedings. Schroeder v. City of New York, 371 U. S. 208 (1962); Walker v. City of Hutchinson, 352 U.S. 112 (1956). It has been applied to tax lien foreclosures. Covey v. Town of Somers, 351 U.S. 141 (1956) And it has been applied to the filing of claims in bankruptcy. City of New York v. New York N.H. & H.R. Co., 344 U.S. 293 (1953); Bank of Marin v. England, 385 U.S. 99 (1966). The language in the Mullane case and in the above cases is certainly broad enough to include within the Mullane doctrine the protection of all persons whose property rights are adjudicated

after service of notice of the adjudication upon them by substituted service rather than actual notice.

The Supreme Court of the United States has not yet spoken on the applicability of the Mullane doctrine to probate non-claim statutes. In spite of the clear and explicit language of the Supreme Court in the above cases, the highest court of four different states have now indicated that Mullane had no application to probate proceedings. Oregon - Chalaby v. Driskell, 237 Ore. 245, 390 P.2d 632 (1964) reh. den. 391 P.2d 624 (1964); Washington-New York Merchandise Co. Inc. v. Stout, 43 Wash. 2d 825, 264 P.2d 863

(1953); Nevada - Continental Coffee Co. v. Estate of Clark, _____ Nev. _____, 438 P.2d 818 (1968); Montana - the instant case. In each of these four cases no real effort was made to grope with the basic principles set forth in Mullane. In fact, the application of Mullane was rejected in the latter two cases without any substantive comment.

It is obvious that the state courts have been and will continue to ignore the Mullane doctrine when dealing with probate non-claim statutes. The use of substituted service by publication exclusively for notice to creditors in probate proceedings is so widespread and

is so well established in custom and habit that most courts are hesitant to apply the Mullane doctrine.

The principles of Mullane should apply with equal force to a probate non-claim statute as to any other situation. Substituted service by publication when the names and addresses of the parties to be notified are known is just as much a fiction or a "feint" in attempting to notify creditors of an estate as in attempting to notify the beneficiaries of a trust, the owners of property slated for condemnation, or the creditors in bankruptcy. The deprivation of property by the non-claims statute is just as complete and decisive, if not

more so, than in the adjudication of a trustee's accounts, a creditor's claim in bankruptcy, or a landowner in a condemnation proceeding. This point was made crystal clear by the Supreme Court of Montana in its opinion in the instant case when it stated:

> The appellant's failure to file its creditor's claim within the statutory period had the effect of barring the claim. Not only was the remedy destroyed, but the right itself wiped out, and the claim ceased to exist. (Emphasis supplied.) Opinion, Appendix 1 at 9 & 10.

An unreliable fiction that has crept into the law should be corrected and eliminated regardless of how long that fiction has been tolerated in the past. When a

citizen's substantial rights are being adjudicated, it is manifestly unfair and unjust to deal in the fiction that notice by publication will reach him when his existence and address are known and he could be given actual notice with very little effort. There is no valid reason for distinguishing and excepting a probate non-claim statute from this principle. To allow an estate to escape the valid debt of a decedent by the calculated silence of the administrater in hopes the creditor would not see the legal advertisements printed in small type on the back pages of the newspaper is to make a mockery of that justice which should be

implicit in the concept of law.

The application of the Mullane doctrine to probate proceedings has produced a flurry of law review comment. Boyd, Some Suggestions for a Model Estate's Code, 47 Minn. L.Rev., 787, (1963); O'Dea, Adequacy of Notice - Due Process, 32 Wash. L.Rev. 165, 178 (1957); Note, Requirements of Notice in In Rem Proceedings, 70 Harv. L.Rev. 1257, 1269-71 (1957); Dowling, Citation and Notice in Probate and Guardianship Proceedings, 42 Fla. Bar J. 28, 29-30 (Jan., 1968); Note, Validity of Probate Notice Statutes in Ohio, 27 U. Cin. L.Rev. 76 (1958); Note, Due Process of Law and Notice of Publication, 32 Ind. L.J. 469,

485 (1957); Note, Notice - Probate Procedure - 1967 Draft of the Uniform Probate Code, 53 Iowa L.Rev. 508 (1967); Note, Notice to Interested Parties in Probate Proceedings, 18 Vand. L.Rev. 1647 (1965); Note, Mullane v. Central Hanover Bank & Trust Co. - Statutory Reaction, 39 Iowa L.Rev. 665, 668-75 (1954); Fraser, Jurisdiction by Necessity - An Analysis of the Mullane case, 100 U. Pa. L.Rev. 305, 316 (1951); Levy, Probate in Common Form in the United States: The Problem of Notice in Probate Proceedings, 1952 Wis. L.Rev. 420.

Typical of these law review comments, is the comment of Professor Boyd:

Although the United States Supreme Court has not expressly applied the Mullane doctrine to probate proceedings, its subsequent reliance on the doctrine in analogous situations has raised the possibility that it will do so when confronted with a probate case. Boyd, Some Suggestions for a Model Estate's Code, 47 Minn.L.Rev. 787, 801 (1963).

Most American probate procedures have been derived from the English ecclesiastical courts which were ex parte proceedings requiring no notice. The old English and early American communities and family groups were sufficiently close to allow the law to indulge in the presumption that all interested persons would be notified on their own. This assumption, is certainly no longer true in the modern society. Note, Notice - Probate Procedure - 1967 Draft of the Uni-

form Probate Code, 53 Iowa L.Rev. 508, 512-13 (1967). It is not surprising, therefore, that the modern probate codes and procedures allow for the service of notice in person or by registered mail when the addresses or identity of interested parties and creditors are known. See Note, Requirements of Notice in In Rem Proceedings, 70 Harv. L. Rev. 1257, 1270-71 (1957); Tilley, The Mullane Case: New Notice Requirements, Mich. State Bar J., January, 1951, P.12, 19-20; Dowling, Citation and Notice in Probate and Guardianship Proceedings, 42 Fla. Bar J. 28, 29-30 (Jan., 1968); Note, Notice - Probate Procedure - 1967 Draft of the Uni-

form Probate Code, 53 Iowa L. Rev. 508, 510 (N. 15), 514 (N. 41), 516-17 (1967). One author has determined that 21 states now require mailed notice to be given to certain interested persons prior to the hearing upon the petition for probate. Id, at 516. Unfortunately, a majority of the States still do not require compliance with the Mullane principles.

Because of the substantial deprivation involved, the widespread existence of statutes similar to the statute in question, and the hesitation of state Supreme Courts to overturn a long standing probate practice, it is respectfully submitted that the question presented herein is so sub-

stantial as to require a plenary consideration with briefs on the merits and oral arguments for its resolution.

The instant case is an excellent case for the full consideration of this issue. The trial court ordered a summary judgment while the appellant was in the process of establishing, in the form of admissions, that the existence of the debt and the address of the appellant was known to the Appellee and to her attorney, that actual notice could have been made either by mail or by hand delivery two short blocks from the business office of the estate, that no such attempt was made by the Appellee or her attorney

and that neither the Appellant nor any of its officers had actual knowledge of the time or place for filing creditors claims prior to the expiration thereof. In view of these potential admissions, the issue is presented clearly and unambiguously.

B. Montana's Non-Claim Statute denied to the Appellant equal protection of the laws in violation of the Fourteenth Amendment.

Section 91-2704 of the Revised Codes of Montana which states that claims against an estate which are not timely presented are barred forever has one significant exception. The statutes continues as follows:

> ... provided, however, that when it is made to appear by the affidavit of the claimant, to the satisfaction of the Court or Judge, that the claimant had no notice as provided in this Chapter, by reason of being out of the state, it may be presented at any time before an order of distribution is entered; . . .

In the instant case the claim was presented before an order of distribution was entered and the Appellant filed a verified petition or affidavit with the Court stating that it had not received actual notice prior to the time of the filing of its claim. Thus, if the Appellant had been a non-resident of the State of Montana, or out of the State of Montana at the time, payment of the

claim would have been authorized under Section 91-2704.

It is immediately apparent from any map that the town of Baker, Montana, is only about thirteen miles from the North Dakota boundry. Further, the next town of any size in the State of North Dakota is Bowman, a distance of approximately 40 miles. Had the appellant been a farmer across the line in the State of North Dakota, it would have been in the same general trade area and would have received the same weekly newspaper.

Nevertheless, such a person would have been entitled to receive payment on its claim under § 91-2704, whereas the

Appellant was not so entitled. Thus, § 91-2704 of the Revised Codes of Montana, also violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States because it discriminates against Montana's own residents.

Discrimination by a state statute or the establishment of classification is permitted only if such classification is based upon some real and substantial distinction. Southern Railway Company v. Greene, 216 U.S. 400, 30 Sup. Ct. 287, 291 (1910). Such classification cannot be made arbitrarily and must have a reasonable and just relation to the things

in respect of which such classification is imposed. Ibid; Metropolitan Casualty Ins. Co. of New York v. Brownell, 294 U.S. 580, 583 (1935). Thus it has been held that a state cannot impose a higher and different tax on foreign corporations than on domestic corporations doing the same business. Southern Railway Co. v. Greene, supra; Louisville and Nashville Railroad Co. v. Gaston, 216 U.S. 418 (1910). Similarly, a state may not require a foreign corporation to submit to different procedural requirements to exercise the same privileges as a domestic corporation similarly circumstanced. Kentucky Finance Corp. v. Paramount Auto Exchange

Corp., 362 U.S. 44, 551 (1923).

The distinction between a resident and a non resident for the purpose of allowing presentation of a tardy claim upon affidavit that no actual notice was received is a completely arbitrary one. A non-resident living only thirteen miles from the City of Baker, within the Baker trade area, and receiving Baker's only weekly newspaper, the Fallon County Times, is in the same position with regard to the filing of creditors claims, as a citizen of the town of Baker. On the other hand, a citizen of Libby, Montana, some 700 miles distant from Baker, Montana, separated by, among other things,

the Continental Divide, would hold exactly the same position with regard to filing a claim in an estate in Baker, Montana, as a person located 700 miles distant in the state of Minnesota, or in some other non-adjoining state. The resident of Minnesota is as likely to see the legal advertisements on the back page of the Fallon County Times as the resident of Libby.

Consequently, the statute in question arbitrarily discriminates against Montana's own residents in relation to the filing of untimely claims in probate proceedings. This arbitrary discrimination resulted in the "wiping out" of the

Appellant's Six Thousand Dollar claim. The statute violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. Because of the substantial effect of this discrimination and the injustice that it purpetrates, a plenary consideration of the issue is warranted.

CONCLUSION

The issues in this case present two substantial constitutional questions. In the first issue, namely, the application of the principles in Mullane to probate non-claims statutes, the Appellant is merely asking This Honorable Court to confirm that what it has said in a long

line of cases has no exception but that the Mullane principles must apply to all persons who stand to have a substantial right ajudicated without receiving actual notice. The importance of this issue is increased by the fact that State courts have demonstrated a reluctance to apply these principles. In the second issue, the Appellant is asking This Honorable Court to examine the basis for a distinction made between residents and non-residents of Montana in a Montana statute to determine whether that statute meets the requir ments of the equal protection clause of the Fourteenth Amendment. It is respectfully submitted that these

questions are substantial and require plenary consideration by this Honorable Court.

Respectfully Submitted,

Thomas E. Towe

Thomas E. Towe
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Billings, Montana 59101
Attorney for Appellant.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I did on the 27 day of December, 1968, serve the within Jurisdictional Statement upon Appellee by depositing a true copy hereof in a sealed envelope bearing United States postage thereon fully prepaid, in the United States Post Office at Billings, Montana, addressed to Appel-

lee's attorneys:

Genie Huntley
Attorney At Law
Baker, Montana
59313

Hughes & Bennett
Attorneys At Law
11 Edwards Street
Helena, Montana 59601

that being the last known addresses of counsel for appellee.

DATED this 27 day of December, 1968.

Thomas E. Towe

Thomas E. Towe
414 Securities Building
Billings, Montana 59101
Attorney for Appellant.

No. 11431

IN THE SUPREME COURT

OF THE STATE OF MONTANA

1968

BAKER NATIONAL BANK,
Plaintiff and Appellant,

-vs-

FRANCES S. HENDERSON, Administratrix of the Estate of Elmer S. Henderson, Deceased,
Defendant and Respondent.

Appeal from: District Court of the Sixteenth Judicial District, Honorable Alfred B. Coate, Judge presiding.

Counsel of Record:

For Appellant:
Thomas E. Towe argued,
Billings, Montana.

For Respondent:
Gene Huntley, Baker, Montana.
Hughes and Bennett, Helena, Montana.
Michael J. Hughes argued,
Helena, Montana.

Submitted: September 12, 1968.
Decided: October 2, 1968.

Filed: October 2, 1968.
Thomas J. Kearney, Clerk.

APPENDIX No-1

Mr. Justice John Conway Harrison delivered the Opinion of the Court.

This case comes to us on appeal from a judgment of the district court of the Sixteenth Judicial District, in and for the County of Fallon, granting the defendant's motion for summary judgment. Factually the case developed as follows: Frances Henderson is the administratrix of the estate of her husband Elmer who died in Baker, Montana, on September 25, 1966. Baker, the county seat of Fallon County, was a town of 1,759 citizens before the death of the decedent. The town and county support two financial institutions, one of which is the plaintiff-ap-

pellant in this case. While the record does not contain much testimony on the character of the decedent it is clear that he was a man of considerable stature for the appellant made a six-thousand dollar loan to him on a promissory note unsecured. Said note was executed on December 15, 1965, and was due and payable on December 15, 1966. Upon appointment as administratrix of her husband's estate the respondent-defendant proceeded according to statute to publish notice to creditors in the newspaper published in Baker. Such publications occurred on October 10th, 27th, November 3rd and 10th. It should be noted that while the community

had two banks it had but one newspaper and this newspaper was the publisher of all legal publications in the county and all obituaries.

Time for the presentation of claims against the estate expired on February 20, 1967, being more than four months after the first publication of notice to creditors. For some unknown reason, unexplained by the record, the appellant bank officials failed to present their claim to the estate until March 25, 1967, some six months after decedent's death, some two and one-half months after the note was due and payable and one month and five days after the time for presentation of claims had expired.

Upon this set of facts the district court granted respondent's motion for summary judgment and this Court is requested to reverse the summary judgment.

The appellant levels a double barreled attack on the district court's action, arguing:

(1) That Montana's non-claim statute does not and should not absolutely preclude the filing of untimely claims by residents who have received no actual notice of the time limitations for the filing of claims.

(2) To the extent that sections 91-2702 and 91-2704, R.C.M. 1947, allow the taking of a person's property from him without notice by either mail or per-

sonal delivery when such actual notice can be accomplished with ease and little effort, these sections deny that person his property without due process of law in violation of both the federal and state constitutions.

The two statutes in question are as follows:

"91-2702. Time expressed in the notice. The time expressed in the notice must be four months after its first publication." and

"91-2704. Time within which claims against an estate to be presented. All claims arising upon contracts, whether the same be due, not due, or contingent, must be presented within the time limited

in the notice, and any claim not so presented is barred forever; provided, however, that when it is made to appear by the affidavit of the claimant, to the satisfaction of the court or judge, that the claimant had no notice as provided in this chapter, by reason of being out of the state, it may be presented at any time before an order of distribution is entered; and, provided, further, that nothing in this chapter contained shall be so construed as to prohibit the right, or limit the time, of foreclosure of mortgages upon real property of decedents, whether heretofore or hereafter executed, but every such mortgage may be foreclosed within the

time and in the manner prescribed by the provisions of this code, other than those of this chapter, except that no balance of the debt secured by such mortgage remaining unpaid after foreclosure shall be a claim against the estate unless such debt was presented as required by the provisions of this chapter."

We find no merit as to appellant's first position. It is inconceivable to this Court that a financial institution in a small community whose officials could not but be well aware of the death of one of their unsecured borrowers whose indebtedness fell due a month and a half

before the time expired for filing claims against the estate would now say they are entitled to actual notice above and beyond what the law of this state requires. A claim against the estate of a decedent not presented within the time and in the manner prescribed by statute is barred. Vanderpool v. Vanderpool, 48 Mont. 448, 138 P. 772, (1914); In re Rodger's Estate, 68 Mont. 46, 217 P. 678 (1923); State ex rel. Steinfort v. District Court, 111 Mont. 216, 107 P. 2d 890; 76 A.L.R. 1371 (1940).

The appellant's failure to file its creditor's claim within the statutory period had the effect of barring the claim.

Not only was the remedy destroyed, but the right itself wiped out, and the claim ceased to exist. Vanderpool v. Vanderpool, supra.

While the appellant's second attack on the judgment of the district court is loaded with numerous decisions and citations of academicians who expound their theories of legal practice in law reviews, it too must fail. To sustain such a position as asked for by the appellant would be to judicially write a new probate code. Any change in the law must come from the legislature. Appellant's position that our code requirements for notice violate constitutional due process

requirements as set down in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 92 L.ed. 865 (1950) is without merit. We have carefully examined the cases cited by both parties to this action and join with other states, with non-claim statutes, in holding that the Mullane doctrine is not applicable to probate proceedings. Continental Coffee Co. v. Estate of Clark, _____Nev._____, 438 P.2d 818; New York Merchandise Co., Inc. v. Stout, 43 Wash.2d 825, 264 P.2d 863 (1953); Chalaby v. Driskell, 237 Ore. 245, 390 P.2d 632, 391 P.2d 624 (1964).

The judgment of the district court

is affirmed.

JOHN CONWAY HARRISON
Associate Justice

We concur.

JAMES T. HARRISON
Chief Justice

FRANK I. HASWELL

HUGH ADAIR

WESLEY CASTLES

Associate Justices.

IN THE DISTRICT COURT OF THE SIXTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF FALLON.

BAKER NATIONAL BANK, Plaintiff, -vs- FRANCES S. HENDERSON, Administratrix of the Estate of Elmer S. Henderson, Deceased, Defendant.	)	Civil No. 4081 MEMORANDUM OPINION

Plaintiff, in brief and in argument, has taken the position that it would be unfair to the plaintiff to deny its claim on the basis of substituted service and without showing that it had actual notice

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of the time limitation for filing of claims. The Statute, however, is clear, mandatory, unimbiguous and of long standing. The construction of that statute by our appellate court, likewise, requires that it be applied whether or not actual notice, as distinguished from due and proper constructive notice, was given. If the court did feel that, in good conscience, actual notice should be given then it would appear that the following statement from the recent case of Ryan v. Ald, Inc., 24 St. Rep. 371, would be controlling.

> "To follow the dictates of justice when in harmony with the law, must be a pleasure; but to follow the

rules of law, in their true spirit, to whatever the consequences they may lead is a duty. This applies as well to rules establishing remedies, as to those establishing rights. Whoever undertakes to determine a case solely by his own notions of abstract justice, breaks down the barriers by which the rules of justice are erected into a system, and he thereby annihilates law."

DATED: November 24, 1967

ALFRED B. COATE
District Judge

COURT SEAL

IN THE DISTRICT COURT OF THE SIXTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF FALLON

BAKER NATIONAL BANK, Plaintiff, -vs- FRANCES S. HENDERSON, Administratrix of the Estate of Elmer S. Henderson, Deceased, Defendant.	)	No. 4081 ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

The above-entitled cause came before the Court on Defendant's motion for a summary judgment.

Mr. Thomas E. Towe of 512 Securities Building, Billings, Montana, appeared in

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behalf of the Plaintiff; and Mr. Gene Huntley of Baker, Montana, appeared in behalf of the defendant.

The facts necessary to the determination of this motion appear to be the following, to-wit:

1. This is a suit by the plaintiff on a promissory note dated December 15, 1965, payable December 15, 1966, wherein the plaintiff, Baker National Bank of Baker, Montana, appears as payee and E. S. Henderson, the same person as Elmer S. Henderson, is the maker.

2. Elmer S. Henderson named in the complaint as the maker of the note attached to the complaint as Exhibit A is deceased.

3. He died September 25, 1966.

4. Frances S. Henderson, the defendant above named, is the duly appointed administratrix of the Estate of Elmer S. Henderson.

5. That notice to creditors of the Estate of Elmer S. Henderson was duly published in the Fallon County Times, a newspaper of general circulation published in Baker, Montana.

6. That such notice was published October 20 & 27 and November 3 and 10, 1966.

7. That the time for the expiration of claims against the Estate of Elmer S. Henderson expired February 20, 1967.

8. That plaintiff presented no claim to the Administratrix of the Estate within

the time specified in the notice to creditors aforesaid.

9. That no creditor's claim was presented with respect to the claim sued upon in this matter until March 25, 1967.

10. That the plaintiff has filed a petition in the probate proceeding of the Elmer S. Henderson Estate (Fallon County Probate No. 1482) in which the following admission appears in paragraph V of Page 2 of said petition,

> "That the presentation of the said Creditor's Claim by the Baker National Bank was not made within the allotted time for filing such claims for the reason that the Baker National Bank received no actual notice of the time for presentation of Creditor's claims,----".

On such facts it is established that there is no genuine issue as to any material fact, that plaintiff has no claim and that the defendant is entitled to judgment as a matter of law; therefore,

IT IS ORDERED that judgment be entered in favor of defendant with costs to be taxed.

DATED this 24th day of November, 1967.

ALFRED B. COATE
District Judge

COURT SEAL

IN THE DISTRICT COURT OF THE SIXTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF FALLON

BAKER NATIONAL BANK, Plaintiff, -vs- FRANCES S. HENDERSON, Administratrix of the Estate of Elmer S. Henderson, Deceased, Defendant.	)	No. 4081 REQUEST FOR ADMISSIONS

TO: Gene Huntley
Attorney At Law
Baker, Montana 59313

Plaintiff requests defendant within twenty (20) days after service of this request to make the following admissions for

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the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That the decedent, Elmer S. Henderson, is one and the same person as E. S. Henderson, doing business as Tri State Truck and Equipment, and that the said decedent borrowed and received Six Thousand Dollars ($6,000.00) from plaintiff prior to his death which has never been repaid.

2. The promissory note, of which Exhibit "A" attached to the Complaint filed herein is a copy, was properly signed and executed by the decedent, and

represented, at the time his estate was admitted to probate, a valid and bonafide claim against his estate.

3. The decedent's indebtedness to plaintiff as aforesaid was known to Frances S. Henderson, the Administratrix of the estate of Elmer S. Henderson, deceased, and to Gene Huntley, the Attorney for the Administratrix at all times material hereto, and was known by said persons to be valid.

4. The address and location of plaintiff has at all times material hereto been known by the said Administratrix and Attorney.

5. The office of the plaintiff is located within two short blocks of the office

of the said attorney which was designated as the place for the transaction of all business of the estate.

6. That no attempt has been made or was ever made by the Administratrix, the Attorney, or any other person representing the estate of Elmer S. Henderson, deceased, to give notice to plaintiff or to any of its officers either in person or by mail of the time for filing Creditor's Claims in the estate.

7. That the Administratrix or the Attorney for the Administratrix could have caused a notice of the time for filing Creditor's claims to be sent to the plaintiff by mail or to be delivered to

the business office of the plaintiff or one of its officers with little or no effort.

8. That neither the plaintiff nor any of its officers had knowledge of the publication of notice to creditors and further that neither plaintiff nor any of its officers had notice of the time for filing the creditors claims until just prior to the filing of its claim.

9. Plaintiff's claim based on the aforesaid promissory note was filed with defendant properly verified and accompanied by a copy of the said promissory note and properly presented in every respect except for the alleged tardiness in its presentation.